STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Owens, PJ, O'Connell and Talbot, JJ

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

ANGEL MORENO, JR.
Defendant-Appellant.

No. 141837

L.C. No. 09-033445-FH
COA No. 294840

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Does MCL § 750.81d abrogate any right to resist an unlawful police entry into premises unless excessive force is used by the police giving rise to a right to self-defense of the person, and so viewed is the statute a constitutional exercise of legislative authority?

Amicus answers: "YES"

Statement of the Facts

Amicus joins the Statement of Facts of the People of the State of Michigan.

Argument

I.

MCL § 750.81d abrogates any right to resist an unlawful police entry into premises unless excessive force is used by the police giving rise to a right to self-defense of the person, and is a constitutional exercise of legislative authority.

A. Introduction

Recently, the Indiana Supreme Court held that "there is no right to reasonably resist unlawful entry by police officers."[1] This unremarkable holding touched off something of a firestorm, but did not, as some claimed, transform unlawful entries into lawful ones.[2] Instead it settled, for the State of Indiana, the manner in which that question—whether the entry was unlawful—is to be controverted. Shall it be by battle or by litigation?[3] The court chose litigation. The dissent mistakenly took the view that the "common law rule supporting a citizen's right to resist unlawful entry into her home rests on . . . the Fourth Amendment to the United States Constitution."[4] And now the question is before this court.

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[1] *Barnes v State*, 946 N.E.2d 572 (Ind., 2011).

[2] See e.g. "Police now have unprecedented power to invade our homes," Coshocton Tribune, 5-28-2011.

[3] As no less a judge than Learned Hand put the matter with regard to the related issue of forcible resistance to arrests, "The idea that you may resist peaceful arrest . . . because you are in debate about whether it is lawful or not, instead of going to the authorities which can determine . . . (is) not a blow for liberty but on the contrary, a blow for attempted anarchy." See *Wright v. Bailey*, 544 F.2d 737, 741 (CA, 1976), quoting Judge Hand as reported in the 1958 Proceedings, American Law Institute, at p. 254

[4] 946 N.E.2d at 580 (dissenting opinion). Oddly enough, the dissent appeared to have no difficulty with abrogation of the common-law rule that an unlawful arrest could be resisted with force. 946 N.E.2d at 579-580 (dissenting opinion).

In the present case, an officer issuing a parking ticket to a vehicle parked in the street determined it was registered to an individual—one Shane Adams—who had several outstanding arrest warrants. The officer approached an individual who had begun to pull a vehicle out of the driveway of a house in the immediate vicinity but who had stopped upon seeing the patrol car. When questioned, this person said that his girlfriend was in the house with several minors, and they were consuming alcohol. When the officer asked if Adams was inside, he said he was unsure. Backup was called, and officers, dressed in full uniform, knocked on the front and back doors of the house. They heard people running. One officer saw approximately 10-15 people running about in the basement and hiding, and also saw empty bottles of alcohol. After about 15 minutes, the homeowner opened the door. When told by the officer that he had information that there were minors present who were consuming alcohol, the homeowner eventually admitted it was so. The officer asked him if he knew those who had occupied the vehicle parked in the street, because there was a warrant out for a person who was believed to have arrived in the vehicle. The homeowner asked if the officers were looking for Adams, and denied he was there. He refused admittance to the officers, insisting they obtain a warrant.

An officer smelled intoxicants and burnt marijuana, and told the homeowner they were entering to secure the residence while they obtained a search warrant. Defendant came to the door, and, using vulgar language, ordered the officers off his porch. When defendant tried to close the door, an officer placed his shoulder in position to prevent its closure, and a struggle ensued. An officer was injured. The house was searched after the search warrant arrived.

The trial court held that the possibility of destruction of evidence did not provide exigent circumstances justifying the attempted entry, but found that defendant "forcibly resisted the

illegal entry by grabbing Officer Hamberg and wrestling with both officers." That court also held that even if Michigan does recognize a right to resist an illegal police entry, that right does not extend to a "subsequent crime against the officer," the court finding probable cause for the violation of MCL § 750.81a.

This court in its order granting leave to appeal has directed that the following questions be addressed:

- whether a person present in his or her own home can lawfully resist a police officer who unlawfully and forcibly enters the home, without violating MCL 750.81d;
- if not, whether, so interpreted, MCL 750.81d is unconstitutional; and
- whether a defendant prosecuted under MCL 750.81d for resisting a police officer who unlawfully and forcibly enters the defendant's home may claim self-defense.

Justice Corrigan further requested briefing on the question of whether the attempted entry was lawful:

- whether the trial court erroneously concluded that the exigent circumstances exception to the warrant requirement did not apply where the police officer testified he smelled burning or burnt marijuana while standing by the opening door of the defendant's home and that the entry was necessary under the circumstances to present the imminent destruction of evidence.

B. Rights, Remedies, and Forums

(1) The Statutory Scheme

MCL § 750.81d, enacted in 2002, provides, in relevant part:

> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs,

> opposes, or endangers a person[5] who the individual knows or has reason to know is performing his or her duties is guilty of a felony . . . .
>
> * * *
>
> (7) As used in this section:
>
> (a) "Obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.

And MCL § 750.479, dating back to 1846,[6] and which had provided that a person cannot "obstruct, resist, oppose, assault, beat or wound" named officers, including law enforcement officers, where those persons were engaged in "lawful acts," was amended in 2002 to limit the

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[5] A person is defined in subparagraph (7)(b) as

(i) A police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police.
(ii) A police officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, or university to enforce state law and the rules and ordinances of that junior college, college, or university.
(iii) A conservation officer of the department of natural resources or the department of environmental quality.
(iv) A conservation officer of the United States department of the interior.
(v) A sheriff or deputy sheriff.
(vi) A constable.
(vii) A peace officer of a duly authorized police agency of the United States, including, but not limited to, an agent of the secret service or department of justice.
(viii) A firefighter.
(ix) Any emergency medical service personnel described in section 20950 of the public health code, 1978 PA 368, MCL 333.20950.
(x) An individual engaged in a search and rescue operation as that term is defined in section 50c.

[6] See Revised Statutes 1846, Ch.156, § 23.

officers to which it applies,[7] and remove the requirement that the acts of those officers be "lawful."[8]

When MCL § 750.479 was employed in cases of resisting or obstructing law enforcement officers—that is, before its amendment, and replacement for this purpose with MCL § 750.81d—it was the rule in Michigan that, in cases of resisting an arrest, an element of the violation was the legality of the arrest, for the statute was viewed as continuing the common-law rule that one has the right to resist an illegal arrest,[9] though not to the extent of using deadly force.[10] But the modern trend was to insist that the forum for resolving whether an arrest was lawful is in the courts rather than in the streets. As Professor LaFave's treatise points out:

> It is arguable, however, that it is not justifiable to use any force to resist an unlawful arrest by one whom the arrested person knows to be a police officer. There are remedies for release available to one unlawfully arrested, and the indignity of the arrest and the inconvenience of the detention until release are relatively minor matters, goes the argument; the remedies should be used rather than force. The Model Penal Code adopts a rule outlawing the use of force against a known police officer, though the arrest is unlawful. Many of the modern codes include such a provision, and even in the absence of such an enactment some courts have abandoned the common law view or have declined to apply it in

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[7] ". . . a medical examiner, township treasurer, judge, magistrate, probation officer, parole officer, prosecutor, city attorney, court employee, court officer, or other officer or duly authorized person serving or attempting to serve or execute any process, rule, or order made or issued by lawful authority . . . ." " MCL § 750.479(1)(a).

[8] ". . . or otherwise acting in the performance of his or her duties. . . ." MCL § 750.479(1)(b).

[9] See e.g. *People v. Rounds,* 67 Mich. 482 (1887); *People v Eisenberg*, 72 Mich App 106 (1976); *People v Dillard*, 115 Mich App 640 (1982); *People v Chatfield*, 143 Mich App 542 (1985).

[10] *People v Eisenberg*, supra.

> the case of police intrusions short of arrest. This rule, of course, does not bar use of force in self-defense if the officer uses excessive force in making the arrest.[11]

And so in 2002 Michigan joined the many jurisdictions that have chosen to require that the forum for establishing whether an arrest is unlawful is not the street, by violence, but the courtroom, through litigation. In *People v Ventura*[12] the Court of Appeals so recognized:

> Examining the language of the MCL 750.81d, unlike in MCL 750.479, we find no reference to the lawfulness of the arrest or detaining act. The language of MCL 750.81d is abundantly clear and states only that an individual who resists a person the individual knows or has reason to know is performing his duties is guilty of a felony. MCL 750.81d. Because the language of the statute is clear and unambiguous, further construction is neither necessary nor permitted, and we decline to " 'expand what the Legislature clearly intended to cover' " and "read in" a lawfulness requirement.[13]

Though virtually all litigation—the present case being an exception—under the statute has concerned the question of resistance to unlawful arrests, the statute does not prohibit only "resisting arrest." Rather, anyone who "assaults, batters, wounds, resists, obstructs, opposes, or endangers" a police officer or other specified law enforcement personnel who the individual "knows or has reason to know is performing his or her duties," whatever those duties may be, is guilty of a felony. And the duties of police officers include entries into premises on exigent

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[11] 2 LaFave *Substantive Criminal Law* § 10.4(h) (footnotes omitted).

[12] *People v Ventura*, 262 Mich App 370, 375-376 (2004).

[13] Noting that MCL § 750.81d(7)(a) defines "obstruct" as including "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command," the Sixth Circuit has observed that "a straightforward reading of the language of § 750.81d(7)(a) provides that the law can be violated in two ways: by physically resisting a command, whether lawful or unlawful, *or* by refusing to comply with a lawful command without using force." *Brooks v. Rothe,* 577 F.3d 701, 707 (CA 6, 2009).

circumstances to prevent the destruction of evidence; under the statute, then, the question of whether the circumstances actually justify a particular entry is to be litigated in court, not fought out on the scene. Physical resistance to the entry is just as impermissible—without regard to the legality of the entry—as is resistance to an arrest.

(2) The Common Law

The common-law rule allowing reasonable physical resistance to an unlawful arrest is not based on the Fourth Amendment. The rule was a component of principles of self-defense.

> The right to resist an unlawful arrest stems from the basic principles governing the law of self-defense. An unlawful arrest at common law amounted to a trespass against the person, such as a battery. This was true even if the person effecting the arrest was a police officer or other law enforcement official. The right, like the law governing self-defense, is a limited one. The person subjected to the illegal arrest may use only a "reasonable" amount of force to repel the arresting official. Therefore, because law enforcement officials rarely use deadly force to arrest a suspect; the law of self-defense prohibited an individual from using deadly force to resist an arrest.[14]

As the Court of Appeals has observed, "The right to resist an unlawful arrest . . . is merely one aspect of self-defense. An unlawful arrest is nothing more than an assault and battery against which the person sought to be restrained may defend himself as he would against any other unlawful intrusion upon his person or liberty."[15] In his treatise on criminal law, Bishop discusses resistance to arrest in a section captioned "The Right to of Self-Defense and defending one another and Property," and says that where an arrest is unlawful "the person on whom the arrest

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[14] Wright, Andrew, "Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom," 46 Drake L. Rev. 383, 384 (1997) (footnotes omitted).

[15] *People v. Eisenberg,* 72 Mich.App. 106, 111 (1976).

is undertaken may lawfully resist, and, in resisting, may lawfully employ all the means for his preservation . . . . But . . . nothing short of an endeavor to destroy the life will justify the taking of life . . . . There is the right to resist, but not to the taking of life."[16] But the common-law rule has been widely repudiated throughout the country, and this change in the law of self-defense has never been found to violate the Fourth Amendment. As the Wyoming Supreme Court noted, "The many state courts which have eliminated the right to resist an unlawful arrest have, of course, assumed that the common law rule has no constitutional dimensions."[17] And courts have directly so held.[18]

The common-law right to resist an unlawful police entry into premises is a sibling to the common-law rule allowing resistance to an illegal arrest; as with the latter rule, the former is also a part of principles of self-defense. Rather than arising under the doctrine of *se defendendo*, the common-law right to resist an illegal entry arises under the "castle" doctrine. As Bishop puts it, because in "the early times, our forefathers were compelled to protect themselves in their habitations, by converting them into holds of defense," the doctrine grew up that no other man has a right to break in, and that the "person within the house may exercise all needful force to

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[16] 2 Bishop, *Bishop on Criminal Law* (Wilson and Son: 1865), § 656, p. 340, 359.

[17] *Roberts v. State,* 711 P.2d 1131, 1136 (Wyo.,1985).

[18] See e.g. *People v. Curtis,* 450 P.2d 33, 37 (Cal. 1969) ("Thus there is no denial of due process because the deprivation of liberty which an individual suffers upon an unlawful arrest is in no substantial or practical way effectuated, sanctioned or increased by [disallowing resistance to illegal arrest] . . . .There is no constitutional impediment to the state's policy of removing controversies over the legality of an arrest from the streets to the courtroom"). And see Miller, Darrell, "Retail Rebellion and the Second Amendment," 86 Ind. L.J. 939, 952 -953 (2011) (". . . no Supreme Court decision has ever held that the right to defend against an unlawful arrest is a constitutional as opposed to a mere common law right").

keep the aggressor out, even to the taking of life."[19] Though whether the common-law rule includes resistance to entry by a known officer has been questioned,[20] it is generally understood that it does.

The common law may be altered by the legislature.[21] MCL § 750.81d, not being limited to resisting illegal arrests, also modifies the common-law rule concerning resisting unlawful entries into premises. This makes sense, as the rationale for abrogating self-help with regard to illegal arrests is compelling also with regard to self-help and unlawful entries by government officials. As with "the lawfulness of an arrest, the lawfulness of police entry into a residence often presents close and peculiarly fact-dependent questions as to which lawyers and even judges may disagree . . . .Such questions, which are only resolved later with the benefit of dispassionate reflection, are particularly ill-suited to the split-second judgments required of police in their

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[19] Bishop, at 357 (and citing *Pond v People*, 8 Mich 150, 177 (1860)).

[20] 1 Hale P.Cr 458, discussing Cook's Case, 79 Eng. Rep. 1063, W. Jones 429, 82 Eng. Rep. 225 (K.B. 1640), says that where a bailiff was unlawfully attempting to enter a dwelling (by breaking open the window) and was killed by the occupant, it was not murder because of the unlawful conduct, but was nonetheless manslaughter because "he knew him to be a bailiff." Bishop takes issue with this reading of the case, saying that the proposition that "an officer who attempts to break the castle on a claim which he himself shows is without foundation, cannot be resisted the same as any other person, deserves no countenance as one of principle." Bishop, at 357, fn. 3.

1 Chitty, *A Practice Treatise on the Criminal Law* (Isaac Riley: 1819), p. 45 says of this circumstance that ". . . if, in the attempt to execute civil process by such forcible entry, the officer, being a known bailiff, be killed, it will be manslaughter, and no more; manslaughter, because he was known to be an officer, and no more, because his attempt was illegal."

The question is whether the use of force was criminal because the bailiff was an officer, or because it was *excessive* under the circumstance because the "intruder" was known to be a bailiff. In any event, that the common law allowed the use of reasonable force to resist an unlawful government entry is the prevalent view.

[21] 1963 Mich.Const., Article 3, § 7.

interactions with the citizenry." Rather, they are "'more properly decided by a detached magistrate rather than by the participants in what may well be a highly volatile imbroglio.' . . . If a police officer makes an entry into a dwelling, with or without a warrant, that is ultimately determined to be unlawful, the remedy is to be found in the courts."[22]

The statute, then, abrogates the common-law privileges to use force to resist an unlawful arrest and also to use force to prevent illegal entry into premises. It does not diminish the Fourth Amendment rights of the People as to searches of premises and seizures of the person, but requires that the *remedy* for any violations of these rights be found in the *courts* through litigation. Because the privilege to resist was, in the case of an illegal arrest, a part of the common-law right to self-defense against an assault, and, in the case of an illegal entry, a part of the "castle doctrine" of defense of the dwelling, the legislature had full authority to modify those common-law principles.

C. Common-law Principles and the Fourth Amendment

There is no federal constitutional requirement that common-law defenses and procedures be adhered to forever. As the Supreme Court said long ago, "[i]t does not follow . . .that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment."[23] This is

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[22] *Commonwealth. v. Gomes*, 795 N.E.2d 1217, 1225 (Mass.App.Ct.,2003). And see *State v Borcuglio*, 826 A.2d 145 (Conn., 2003).

[23] *Twining v. New Jersey*, 211 U.S. 78, 101, 29 S.Ct. 14, 20, 59 L.Ed. 97 (1908), overruled in part by *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct 1489, 12 L.Ed. 2d 653 (1964).

even so—or at least so has said the Supreme Court—with regard to the *substance* of the Fourth Amendment. That Court has held impermissible common-law practices that were proper at the time of the ratification of the Bill of Rights, saying that in its decisions it had "not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage."[24] Thus in *Tennessee v. Garner* the Court found the use of deadly force to stop all fleeing felons "unreasonable" under the Fourth Amendment, though that force was permissible at the common-law, holding that the rule no longer made sense in modern society. One may take issue with such an approach.[25] But whatever approach one takes to determining the scope of the protection against unreasonable search or seizure under the Fourth Amendment in relation to common-law principles existing at the time of its ratification, legislative modification of principles concerning self-defense, including the privilege to use force to resist an unlawful arrest and to resist an unlawful entry, is not a modification of the rights protected by the amendment. The legislature, in determining the appropriate forum for determination of whether individual rights were violated in particular circumstances, does not have fastened upon it the "straightjacket" of common-law principles.

D. Conclusion

Amicus thus answers the court's questions: 1) a person present in his or her own home cannot lawfully resist a police officer who unlawfully and forcibly enters the home, without

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[24] *Tennessee v. Garner,* 471 U.S. 1, 13, 105 S.Ct. 1694, 1703, 85 L.Ed.2d 1 (1985).

[25] "In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Wyoming v. Houghton*, 526 U.S. 295, 299, 119 S.Ct. 1297, 1300, 143 L.Ed. 2d 408 (1999).

violating MCL § 750.81d; 2) so interpreted, MCL § 750.81d is constitutional; and 3) a defendant prosecuted under MCL 750.81d for resisting a police officer who unlawfully and forcibly enters the defendant's home may claim self-defense only when excessive force is used against him or her.[26]

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[26] Amicus defers to the brief of the People of the State of Michigan with regard to Justice Corrigan's question concerning exigent circumstances, and refers the court also to *Kentucky v King*, __US__, 131 S.Ct. 1839 (2011), which, while not resolving whether the entry there was permissible, is instructive.

Relief

WHEREFORE, amicus requests that this Honorable Court affirm the Court of Appeals.

Respectfully submitted,

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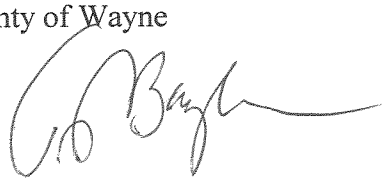

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